HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,
 	
                         Plaintiff,
 	
        v.
 	
MOTOROLA, INC., et al.,
 	
                         Defendants.
	No. C10-1823-JLR
	
	MICROSOFT'S 3/22/12
	MOTION TO SEAL
	
	NOTED FOR:
	Friday, March 30, 2012

MOTOROLA MOBILITY, INC., et al.,
 	
                         Plaintiffs,
 	
        v.
 	
MICROSOFT CORPORATION,
 	
                         Defendant.	

I. RELIEF REQUESTED

Microsoft respectfully requests permission to file under seal Exhibit 3 to the

Declaration of Douglas I. Lewis filed in support Microsoft's Motion for Summary Judgment of

Invalidity (the "Lewis Declaration"). Exhibit 3 to the Lewis Declaration is a true and correct

copy of Motorola Mobility, Inc.'s and General Instrument Corp's Second Amended Disclosure

of Asserted Claims and Infringement Contentions, served on March 9, 2012.

Microsoft seeks to file Exhibit 3 to the Lewis Declaration under seal pursuant to Local

Civil Rule 5(g) and Paragraphs 2(a) and 8 of the Protective Order Regarding The Disclosure

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1 and Use of Discovery Materials entered by the Court on July 21, 2011 (ECF No. 72) (the

2 "Protective Order"). Exhibit 3 contains several hundred pages that refer to and describe

3 Microsoft's proprietary source code for Windows 7 and Internet Explorer 9. These pages have

4 been appropriately designated as "Contains Confidential Business Information and

5 Confidential Source Code Subject to Protective Order." This is the only document Microsoft

6 seeks to file under seal in connection with its Motion for Summary Judgment of Invalidity.

7   Public disclosure of the information contained in Exhibit 3 would expose Microsoft to

8 significant risk of commercial harm. For this reason, Microsoft respectfully requests that the

9 Court permit Exhibit 3 to remain filed under seal. Microsoft's underlying Motion for

10 Summary Judgment, as well as the Lewis Declaration and the other exhibits thereto, are being

11 filed as part of the public record.

II.   FACTS & AUTHORITY

A.   The Protective Order and Applicable Court Rules Permit Microsoft's Confidential Business Information To Be Filed under Seal.

Pursuant to the Protective Order, Microsoft is permitted to file Confidential Business Information[1] or other trade secrets under seal. Paragraphs 2(a) and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a) provides:

> Any information submitted in pre-trial discovery or in a pleading, motion, or response to a motion in this action, either voluntarily or pursuant to order, and which is asserted by a supplier to contain or constitute Confidential Business Information shall be so designated by such supplier in writing…and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: "[SUPPLIER'S NAME] CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER" or a comparable notice. During the pre-trial phase of this action, such information, whether submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court and shall be filed only under

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[1] "Confidential Business Information" is defined in the Protective Order as "information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amounts or source of any income, profits, losses, or expenditures." Protective Order, ¶1.

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seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District
Court for the Western District of Washington.

Paragraph 8 likewise provides that:

> Any Confidential Business Information submitted to the Court in connection
> with a motion or other proceeding within the purview of this action shall be
> submitted under seal pursuant to paragraph 2 above.

Id., at ¶ 8.

In addition, the Federal Rules of Civil Procedure recognize that courts may permit
parties to file "trade secrets or other confidential research, development, or commercial
information" under seal. Rule 26(c)(1)(G) and (H). District courts "are in the best position to
weigh the fairly competing needs and interests of the parties affected by discovery," in crafting
the appropriate treatment of documents for which protected treatment is requested. *Seattle
Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General
Motors Corp.*, 307 F.3d 1206, 1211-1212 (9th Cir. 2002). Further, pursuant to Local Rule CR
5(g)(2), the Court may seal a document filed in support of a dispositive motion upon a
"compelling showing that the public's right of access is outweighed by the interests of the
public and the parties in protecting the court's files from public review." *See also Kakakama
v. City and Cnty of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006).

While the public generally enjoys a right to inspect and copy public records, "it is
uncontested … that the right to inspect and copy judicial records is not absolute. Every court
has supervisory power over its own records and files, and access has been denied where court
files might have become a vehicle for improper purposes." *Nixon v. Warner Communications,
Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). One such "improper purpose" is where the
commercial business information at issue is sought to be used as a "source[] of business
information that might harm a litigant's competitive standing." *Id.* (denying access to copies
of tapes played at trial and noting that courts refused public access to their files where granting
such access might "become a vehicle for improper purposes," including causing a litigant

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1   competitive harm); *see also Network Appliance, Inc. v. Sun Microsystems Inc.*, No. C-07-

2   06053, 2010 U.S. Dist. LEXIS 21721 (N.D. Cal. Mar. 10, 2010) (granting motion to seal

3   source code).

4   **B.**   **Compelling Reasons Exist for Maintaining under Seal Documents that Disclose**
            Non-Public and Commercially Sensitive Information Regarding Microsoft's

5   **Source Code; Disclosure Creates an Unreasonable Risk of Competitive Harm with**
            No Countervailing Benefit to the Public.

6

7   Exhibit 3 to the Lewis Declaration contains references to and descriptions of

8   Microsoft's non-public, proprietary source code for its Windows 7 and Internet Explorer 9

9   software programs. This information is highly confidential and commercially sensitive. In the

10 ordinary course of its business, Microsoft takes great care to protect against unauthorized

11 disclosure of this information. While this information may be of interest to Microsoft's

12 competitors, the general public has no legitimate non-commercial use for technical information

13 of this nature. Microsoft seeks to file Exhibit 3 under seal because it contains Microsoft's

14 proprietary intellectual property, the disclosure of which would create an unreasonable risk of

15 commercial or competitive harm to Microsoft with no valid countervailing benefit to the

16 public.

17   Microsoft has attempted to limit the amount of sealed information to the minimum

18 necessary to protect its commercially sensitive information. Microsoft is not requesting to file

19 its underlying Motion for Summary Judgment of Invalidity, the Lewis Declaration, or any

20 other exhibits thereto under seal. Microsoft seeks only to file Exhibit 3 under seal, for the

21 reason that it discloses confidential commercial information regarding Microsoft's Windows 7

22 and Internet Explorer 9 source code. This document has already been properly designated as

23 "Confidential Business Information" under the terms of the Protective Order. Microsoft

24 believes it should remain protected from public disclosure.

25

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III.   CONCLUSION

Microsoft has filed Exhibit 3 to the Lewis Declaration under seal based on its good faith belief that this document qualifies for protection under the terms of the Protective Order, Rule 26(c), and Local Rule CR 5(g)(2). As set out above, there are compelling reasons to maintain Exhibit 3 under seal. Microsoft respectfully requests that the Court grant its motion.

DATED this 22nd day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2012, I electronically filed the foregoing document

with the Clerk of the Court using the CM/ECF system, which will send notification of such

filing to the following:

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